UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

IN RE:	)	Case No. 93-30371
	)	Chapter 11
ANCHELE ASSOCIATES,	)	
	)	
Debtor.	)	
	)	

ORDER GRANTING MOTION TO DISMISS

This matter is before the court on the motion of First Union National Bank of North Carolina ("First Union") for dismissal of the debtor's voluntary Chapter 11 petition for: (i) lack of good faith in its filing pursuant to 11 U.S.C. § 1112(b); (ii) the debtor's inability to effectuate a plan of reorganization pursuant to 11 U.S.C. § 1112(b)(2); and (iii) the unreasonable delay caused by the debtor's filing that is prejudicial to First Union pursuant to 11 U.S.C § 1112(b)(3).

This motion was heard on April 30, 1993, and having considered all of the evidence and argument of counsel, the court has concluded that sufficient cause exists to dismiss the debtor's petition due to a lack of good faith in its filing and due to the debtor's inability to effectuate a plan of reorganization.

BACKGROUND FACTS AND PROCEDURAL HISTORY

The debtor, Anchele Associates ("Anchele"), is a general partnership formed under North Carolina law on March 4, 1993, in order to acquire certain property and commence this case under Chapter 11 of the Bankruptcy Code on March 9, 1993, "for the purpose of restructuring and servicing the debt secured thereby out

of a combined cash flow."[1] Anchele's general partners are Samuel J. Wornom III ("Wornom"), who holds an eighty percent (80%) general partnership interest, and Twelve Oaks Associates ("Twelve Oaks"), a North Carolina general partnership, which holds a twenty percent (20%) general partnership interest.

Both Twelve Oaks and Wornom are indebted to First Union under a promissory note ("Twelve Oaks Note") executed by Twelve Oaks and guaranteed by Wornom and others which matured on January 1, 1993, and which as of April 1, 1993, had an outstanding balance of $381,021.21. Wornom is also obligated to First Union as guarantor of a promissory note ("New Hope Note") executed by Southern Investment Company of Fayetteville, Inc. ("Southern Investment") and assumed by New Hope Properties, Inc. ("New Hope") which matured on January 26, 1993, and which as of April 1, 1993, had an outstanding balance of $180,695.00. Anchele has not borrowed any money from, or assumed any obligation owing to, First Union.

The Twelve Oaks Note is secured by an undeveloped tract of real property located in New Hanover County, North Carolina ("Twelve Oaks Property") by virtue of a deed of trust ("Twelve Oaks Deed of Trust") executed by Twelve Oaks, which constitutes a first lien on the Twelve Oaks Property. The New Hope Note is secured by an office building located in Cumberland County, North Carolina ("New Hope Property") by virtue of a deed of trust ("New Hope Deed

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[1]Proposed Disclosure Statement for Debtor's Plan of Reorganization, page 4.

of Trust") executed by Southern Investment, which constitutes a first lien on the New Hope Property.

Anchele's only assets consist of the Twelve Oaks Property, the New Hope Property, and an undivided one-third interest in a convenience store located in Union County, North Carolina ("Sarsaparilla Property"), all of which Anchele acquired the same day it was formed and five days prior to the commencement of this case. The Twelve Oaks Property was conveyed to Anchele by deed filed on March 5, 1993, subject to the Twelve Oaks Deed of Trust, for $1,000.00 and a purchase money promissory note secured by a balance purchase money deed of trust for $131,316.43. The New Hope Property was conveyed to Anchele by deed recorded March 5, 1993, subject to the New Hope Deed of Trust and a second lien deed of trust held by New South Investors, Inc. ("New South") for $1,000.00. The entire fee of the Sarsaparilla Property was conveyed by GWH Development Company to its general partners, George R. Perkins, Jr., Eugene B. Horne, Jr., and Sarsaparilla, Ltd., by deed recorded March 5, 1993, and by deed recorded one minute later, Sarsaparilla conveyed its one-third interest to Anchele for $1,000.00 and a purchase money note secured by a balance purchase money deed of trust for $32,000.00 ("Sarsaparilla Deed of Trust").

Wornom's wife, Sandra L. Wornom, is the sole shareholder of Sarsaparilla and New South. George R. Perkins, Jr., who is a general partner of GWH Development Company and majority shareholder of New Hope, is a close personal friend and business associate of Wornom. Wornom, in addition to holding an eighty percent (80%)

general partnership interest in Anchele and a ten percent (10%) general partnership interest in Twelve Oaks, is President of Nouveau Properties, Inc., which holds a fifty-four percent (54%) general partnership interest in Twelve Oaks, and President of Nouveau Investments, Inc., which holds a thirty-six percent (36%) general partnership interest in Twelve Oaks. Thus, Wornom controls Anchele and Twelve Oaks, and has considerable influence with New Hope, New South and Sarsaparilla. Charts depicting the ownership structure of the various entities and the conveyance history of the Anchele assets are attached.

Prior to the commencement of this case, First Union commenced an action ("Twelve Oaks Lawsuit") in Mecklenburg County Superior Court ("Superior Court") against Twelve Oaks, Wornom, Nouveau Investments, Inc., Nouveau Properties, Inc., and former general partners and continuing guarantors Neal Hunt, and Skellie Hunt, to recover the outstanding balance due under the Twelve Oaks Note and the guarantees thereof. First Union obtained entries of default against Neal Hunt and Skellie Hunt. First Union filed a motion for summary judgment against the remaining defendants in the Twelve Oaks Lawsuit, which was scheduled for hearing on March 11, 1993. The summary judgment hearing was thwarted by the commencement of this case less than forty-eight hours before the hearing and the removal by Anchele and Wornom of the Twelve Oaks Lawsuit to this court, now identified as Adversary Proceeding No. 93-3108.

Following the filing of the summary judgment motion by First Union, Wornom sent a letter to First Union dated January 7, 1993

("Wornom Letter"), in which he proposed a work-out of the defaults in the Twelve Oaks Note and the New Hope Note by a method almost identical to Anchele's proposed Plan of Reorganization ("Plan") described below. This proposal contained in the Wornom Letter was rejected by First Union on February 1, 1993.

On March 25, 1993, First Union commenced an action in Superior Court against Wornom and the other guarantors of the New Hope Note ("New Hope Lawsuit") to recover the outstanding balance due under the New Hope Note and the guarantees thereof. Anchele and Wornom have since removed the case to this court, now identified as Adversary Proceeding No. 93-3897.

On April 12, 1993, Anchele filed its Plan and Proposed Disclosure Statement ("Disclosure Statement") in this case.[2] Although Anchele has no "personal" liability to First Union under either the Twelve Oaks Note or the New Hope Note, the Plan provides that upon the court's determination of value, Anchele will transfer the Twelve Oaks Property to First Union in satisfaction of the Twelve Oaks Note, with any surplus value being applied to reduce the balance under the New Hope Note. The Plan further provides that Anchele will modify the terms of the New Hope Note by substituting its promissory note for the balance due under the New Hope Note at a fixed interest rate of seven percent (7%), amortized over twenty years with a balloon payment due in five years. The

[2]Twelve Oaks filed a voluntary Chapter 11 petition in this Court the day before the hearing on First Union's Motion. Anchele represented to the Court that Twelve Oaks would join in the Anchele Plan.

debt will be serviced mainly by the net rent from a Master Lease with Nouveau Properties, Inc., a company of which Wornom is the sole shareholder, and subleases between Nouveau Properties, Inc., and as yet to be identified third parties. Lastly, the Plan provides that the rights of all creditors with respect to claims arising prior to confirmation "shall be limited exclusively to the rights afforded by the Plan," the effect of which was disputed by the parties. First Union contends it constitutes a general partner and guarantor discharge. Anchele contends it does not.

On April 7, 1993, First Union filed its Motion to Dismiss.

DISCUSSION

I. Dismissal for Lack of Good Faith.

First Union has moved for dismissal of the debtor's Chapter 11 petition in part because it was not filed in "good faith." The basic framework for considering that contention was established by the Fourth Circuit in Carolin Corp. v. Miller, 886 F.2d 693, 694 (4th Cir. 1989). In Carolin, the Fourth Circuit held that:

> [A] bankruptcy court may dismiss [a voluntary Chapter 11 bankruptcy] petition for want of good faith in its filing, but only with great caution and upon supportable findings both of the objective futility of any possible reorganization and the subjective bad faith of the petitioner in invoking this form of bankruptcy protection.

Id. at 694. In establishing this principle, the Fourth Circuit acknowledged that the Bankruptcy Code does not contain a specific good faith filing requirement for Chapter 11 cases. Id. at 698. The Carolin court reasoned, however, that because of the broad

policy considerations of the Bankruptcy Code and the language of several provisions of the Bankruptcy Code and of the Bankruptcy Rules, a debtor's good faith was an implicit requirement for the filing of a Chapter 11 petition. Id.

Although recognizing a bankruptcy court's authority to dismiss a Chapter 11 bankruptcy petition for lack of good faith in filing, the Fourth Circuit in Carolin admonished bankruptcy courts to use great care and caution in exercising the power to dismiss. Id. at 700. The Fourth Circuit warned bankruptcy courts to remember that the Bankruptcy Code provides creditors of Chapter 11 debtors with remedies such as relief from stay, adequate protection, and dismissal or conversion under 11 U.S.C. § 1112(b), and that courts should not use dismissal for lack of good faith in filing as an easy alternative to creditors' other post-petition statutory remedies. Id. The Fourth Circuit recognized that by using dismissal as an alternative to the statutory remedies, courts would be subverting the reorganization scheme envisioned in the Bankruptcy Code. Id.

The Fourth Circuit in Carolin adopted a two-pronged test for bankruptcy courts to apply in considering whether to dismiss a Chapter 11 petition for lack of good faith in filing. Id. at 700-01. The Carolin court required a showing of both objective futility and subjective bad faith in filing before a court properly could dismiss a Chapter 11 petition for lack of good faith. Id. The court noted that in applying the two-pronged test, a court should attempt to determine whether allowing the Chapter 11

petition to proceed past filing would further the purposes of the Bankruptcy Code. Id. at 701. In adopting the two-pronged test, the Fourth Circuit noted that courts should inquire into objective futility to ensure that the bankruptcy proceeding will in some way be related to revitalizing a financially troubled debtor. Id. at 701. The Carolin court directed courts to focus on determining whether there exists a going concern to preserve and whether there exists any hope of rehabilitation. Id. The Fourth Circuit noted, further, that courts should inquire into the debtor's subjective bad faith to ensure that the debtor actually intends to use the provisions of Chapter 11 to reorganize an existing enterprise or to preserve going concern values of an existing business. Id. at 702. The Fourth Circuit in Carolin stated that the subjective bad faith inquiry would allow courts to determine whether the debtor's real motive in filing a Chapter 11 petition was to abuse the reorganization process and to delay creditors through the automatic stay without any intent or ability to reorganize its activities. Id.

The Fourth Circuit in Carolin noted that in applying the two-pronged test, courts should inquire into the totality of the circumstances surrounding the filing Id. at 701. The Fourth Circuit also stated that courts should not rely on any list of factors and that no single factor necessarily would lead to a finding of lack of good faith in filing. Id.

Courts other than the Fourth Circuit have considered the dismissal of a Chapter 11 petition for lack of good faith in filing

and have recognized that courts should consider the totality of the circumstances surrounding the filing of the bankruptcy petition. See Little Creek Devel. Co. v. Commonwealth Mortgage Corp. (In re Little Creek Devel. Co.), 779 F.2d 1068 (5th Cir. 1986); In re L'Puente Ltd. Partnership, 104 Bankr. 503 (Bankr. S.D. Fla. 1989); In re Krilich, 87 Bankr. 178 (Bankr. M.D. Fla. 1988); North Central Devel. Co. v. Landmark Capital Co. (In re Landmark Capital Co.), 27 Bankr. 273 (Bankr. Ariz. 1983). The many factors considered by these courts include, inter alia, the number of unsecured creditors and the debts owing to such creditors; the number of assets belonging to the debtor; whether the reorganization essentially involves the resolution of a two-party dispute; the number of employees of the debtor, excluding its principals; the existence of a foreclosure proceeding on the debtor's encumbered assets or some other court proceeding which was delayed as a result of the filing; the existence of the "new debtor syndrome"; and the realistic possibility of an effective reorganization.

In applying these principles to the facts of this case, the court can conclude only that Anchele's petition is subject to dismissal for lack of good faith because (a) first, the objective futility of any possible reorganization and (b) Anchele's subjective bad faith in filing its petition.

A. Objective Futility of Reorganization

Congress designed Chapter 11 of the Bankruptcy Code "to prevent the waste and reduction in asset values that result from unnecessary liquidation. Congress meant to encourage financial

restructuring and to reestablish efficient business operations." In re Sirius Systems, Inc., 112 Bankr. 50, 52 (Bankr. D.N.H. 1990) (quoting In re Schlangen, 91 Bankr. 834, 837 (Bankr. N.D. Ill. 1988)). The essence of Chapter 11, thus, is business reorganization. Id. (quoting In re Harvey Probber, Inc., 44 Bankr. 647, 650 (Bankr. D. Mass. 1984)). Bankruptcy was not designed as a forum for two-party disputes.

The inquiry under this prong of the test normally focuses on the debtor's financial stability or future projections regarding the debtor's business operations. See, In re Kent, 145 B.R. 840, 841 (E.D. Va. 1991); In re I-95 Technology-Industrial Park, L.P., 126 B.R. 11, 15 (Bankr. D. RI 1991). This case presents different issues before the court due to the nature of the debtor itself. The debtor was not an on-going business prior to the decision to file bankruptcy. This scenario is often referred to as the "new debtor syndrome" and is one of several variables considered in the subjective prong of the test. In re Little Creek Devel. Co., 779 F.2d 1068, 1073. Three assets were combined together to form a debtor for this case five days before the petition was filed. That debtor then filed bankruptcy and submitted a plan for its "reorganization". Assuming that the debtor's plan meets all the requirements for confirmation (which the court has serious doubt), the second prong of Carolin would seem to be lacking. However, the court is of the opinion that Carolin does not prevent the court from first assessing whether there is, in fact, a debtor to reorganize. Chapter 11 was not designed to pick out a two-party

dispute from a business operation and then referee that dispute. The court is not suggesting that all cases, involving what are essentially two-party disputes, should be dismissed for lack of good faith. Rather, the facts of this case suggest that there is no real reorganization. There is a debtor, but in name only.

For all of these reasons, the court must find that Anchele's bankruptcy petition and Plan does not present a situation where the court can find that there is a business operation that can be reorganized.

B. Subjective "Bad Faith"

In addition to finding that Anchele has no objective and realistic possibility to reorganize successfully, the court must find that because this debtor did not file its Chapter 11 petition for a proper purpose consistent with the purposes of Chapter 11 of the Bankruptcy Code, the debtor's filing of this Chapter 11 petition was in "bad faith," or not in "good faith."

The principles of Carolina, Little Creek, Landmark, and the other cases cited previously reveal principles relevant to this case. First, although the term "bad faith" may produce images of malfeasance, there is no moral element to that standard in these circumstances. So, the court may find subjective "bad faith" even in the absence of any element of moral turpitude in the debtor's motivation. Here, the debtor's principal, Wornom, appears to be honest and forthright in every respect. There was nothing evil or unlawful in any of the debtor's actions which he, as its principal, prompted. Wornom, instead, was motivated by his own self-interest,

which is understandable. His self-interest, however, does not comport with the proper purposes of the filing of a Chapter 11 petition in the circumstances of this case.

Second, to support a finding of subjective bad faith, the court necessarily must find that the Chapter 11 petition was filed for a purpose other than one that is consistent with the goals of the Bankruptcy Code. See Carolin, 886 F.2d at 702. The fundamental purpose of Chapter 11 is to serve as a debt collection device that solves the "common pool" problem of multiple creditors having claims against debtors having insufficient assets fully to satisfy all of their debts.[3] So, the fundamental goal of Chapter 11 is to optimize the benefits to creditors. In this case, the only significant, non-insider creditor is First Union; the debtor's schedules show approximately $4,100 of unsecured debt, $2,00 of which is a law firm, and the only other secured debt is to insiders or friends of Wornom.

In the Chapter 11 scheme of priorities, the interests of owners come last and are protected only when, and if, all other senior interests have been protected. Here, it is apparent that Wornom filed this bankruptcy petition to prevent any collection by First Union on his guarantee. Although this might be a proper

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[3]There are other related purposes such as preserving jobs for employees and generally benefiting the local community by preserving the existence of an employer. Those factors are not important here, however, because (1) the debtor employs few, if any, people, and (2) the properties owned by the debtor have only one logical use, which likely would be preserved by any subsequent owner. Thus, the continuing existence of this debtor is not essential to potential employees or the communities.

purpose for his own Chapter 11 case, it is not a proper purpose for this debtor, Anchele. The court can conclude only that Anchele filed this bankruptcy petition to frustrate First Union's efforts to collect on Wornom's guarantee and to convert his guaranty of payment to a guaranty of collection.

Furthermore, most, if not all, of the previously-cited factors indicating bad faith are present in this case. Anchele only has three assets, one of which is an undivided one-third interest in real property. In addition, although significant effort has been given to make it appear otherwise, this is clearly a two-party dispute between First Union and Wornom. Furthermore, no other significant non-insider creditors exist.

However, this case involves a twist on the "new debtor syndrome," the existence of which the court in Carolin held was the "ultimate inference of a deliberate invocation of Chapter 11 protection for abusive rather than permissible purposes." Carolin, 886 F.2d at 704. In the usual new debtor syndrome situation, a new entity is created on the eve of foreclosure which files bankruptcy after acquiring the property in dispute for the sole purpose of staying the foreclosure sale of the property. In this case, First Union chose to pursue the individuals liable under the Twelve Oaks Note and the New hope Note rather than to foreclose its security interest in the real property. Anchele was created to commence this case in order for Wornom to remove the Twelve Oaks Lawsuit on the eve of the hearing on First Union's motion for summary judgment. The Notice of Removal asserts that removal is warranted

as the action is "related to the debtor's bankruptcy case within the meaning of 11 U.S.C. § 1334 because it alleges an interest by plaintiff in real property of the debtor as of the commencement of the case, which is property of the estate," and that proceedings involving a "claim against the real property of the debtor" is a core proceeding. (See paragraphs 8 and 9 of Notice of Removal, Adversary Proceeding No. 93-3108.) On April 8, 1993, the New Hope Lawsuit was removed to this court by Anchele and Wornom based on similar allegations. Although the allegations are true, neither the Twelve Oaks Lawsuit nor the New Hope Lawsuit seeks to enforce any claim against the debtor's real property. These actions were commenced by First Union to obtain judgments personally against Wornom and the other guarantors and general partners, which First Union had the right to do under its loan documents and applicable non-bankruptcy law. Rather than the typical purpose, this new debtor was formed to attempt to force First Union to take the Twelve Oaks Property in satisfaction of, or at least in reduction of, its debt.

It is obvious that Wornom orchestrated these transactions to delay and frustrate First Union's efforts to enforce its rights against him, Twelve Oaks, New Hope, and the other guarantors and general partners and, ultimately, to obtain satisfaction of his personal liability to First Union without having to submit all of his personal assets to the jurisdiction and scrutiny of the Bankruptcy Court and the obligations and limitations of the Bankruptcy Code. Moreover, he seeks to force upon First Union a

proposal which First Union rejected during pre-petition arm's-length bargaining, which this court has previously held is impermissible. See Nantahala, slip op. at 20, n. 6 ("the Bankruptcy Code does not purport to be a method for a debtor to obtain through the filing of its bankruptcy petition that which it had failed to obtain at the bargaining table . . ."). These are clearly not proper purposes for filing a Chapter 11 petition.

For all of these reasons, the court must find that Anchele filed its Chapter 11 petition in bad faith and must conclude that the findings on the objective futility of reorganization and the subjective bad faith of Anchele justify the court's grant of First Union's motion for dismissal.

II. Dismissal Pursuant to Section 1112(b)(2) and (3)

The court also finds that this case merits dismissal pursuant to Section 1112(b)(2) on account of the factors enunciated above supporting the court's finding of objective futility. The court finds that the evidence is insufficient, however, to support dismissal under Section 1112(b)(3).

It is therefore ORDERED that the Chapter 11 petition filed by the debtor is dismissed, and the debtor's oral motion to stay such dismissal pending appeal is denied.

This the 22 day of July, 1993.

George R. Hodges
United States Bankruptcy Judge